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IN THE SUPREME COURT OF FLORIDA

CONSOLIDATED
CASE NOS. 80,419 & 80,432

IN RE AMENDMENT TO FLORIDA RULES OF JUDICIAL ADMINISTRATION, PUBLIC ACCESS TO JUDICIAL RECORDS	CASE NO. 80,419
and	
IN RE THE FLORIDA BAR PETITION TO AMEND RULES REGULATING THE FLORIDA BAR	CASE NO. 80,432

RESPONSE OF THE FLORIDA PRESS ASSOCIATION AND FLORIDA SOCIETY OF NEWSPAPER EDITORS

THOMSON MURARO RAZOOK & HART, P.A.
Parker D. Thomson (Fla. Bar# 081225)
Carol A. Licko (Fla. Bar #435872)
One Southeast Third Avenue
Suite 1700
Miami, Florida 33131
(305) 350-7200

Attorneys for The Florida Press Association and Florida Society of Newspaper Editors

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The Florida Press Association and Florida Society of Newspaper Editors (the "Press") file this Response to the proposed amendments to the Rules of Judicial Administration and the Rules Regulating the Florida Bar, which amendments would create new rules governing public access to the records of the judicial branch and its agencies and to the records of the Florida Bar (the "Proposed Rules").

INTRODUCTION

This Response is composed of three sections: (1) a general overview of the relevant law and policy with respect to the Proposed Rules; (2) a detailed analysis of the Proposed Rules; and (3) a copy of the Proposed Rules, revised to reflect the revisions suggested herein.

I. OVERVIEW OF RELEVANT LAW AND POLICY

This Court traditionally has been at the forefront in zealously safeguarding the public's right to open government. The proposed Constitutional Amendment on Access to Public Records and Meetings requires even greater vigilance by this Court in protecting the public's right of access to all government functions. But the current form of the proposed Rules of Judicial Administration and Rules Regulating the Florida Bar sound a retreat from the guiding principles previously established by this Court. The Proposed Rules ignore the distinction between the role of the judiciary as (i) a governmental agency expending public funds and

employing government personnel (the "administrative function"); and (ii) supervisor and custodian of judicial records as part of the adjudicatory process (the "adjudicatory function"). It is only the adjudicatory function which differs from other governmental agencies and requires a different standard of access. The administrative function must be governed by the same standards of disclosure and public access which are imposed on the coordinate branches of government. Any perceived attempt by the judiciary to create a preferred position for itself with respect to these administrative functions would not only fly in the face of the intent of the Proposed Constitutional Amendment, but would foment the public mistrust of governmental officials which this Court's traditional commitment to open government has sought to prevent.

A. The Relevant Law And Policy With Respect To The Proposed Rules

1. The Proposed Constitutional Amendment.

The Proposed Constitutional Amendment on Access to Public Records and Meetings ("Proposed Constitutional Amendment") has four sections:

a. Subsection (a) follows the approach of the Public Records Law[1/] in giving all persons the right to inspect and

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1/ The Public Records Law is Chapter 119, Florida Statutes (1991). The Law, although a statute, has received constitutional recognition in Article I, Section 23, Florida Constitution, which requires that the constitutional privacy right there created not be construed "to limit the public's right of access to public records . . . as provided by law."

copy any public record, and making clear that the reach of this right extends to the judicial branch, as well as to the legislative and executive branches.?' Exceptions from this broad general rule are permitted if "pursuant to this [Article I, Section 24] or [if] specifically made confidential by this Constitution."

b. Subsection (b) constitutionalizes the "Government in the Sunshine" Law.

c. Subsection (c) permits the legislature to make exemptions provided each exemption: (i) is separately adopted and relates to only "one subject", (ii) states "with specificity the public necessity justifying the exemption", and (iii) is "no broader than necessary to accomplish the stated purpose."

d. Subsection (d) grandfathers laws in effect on July 1, 1993 which limit access and similar limiting "rules of the court in effect on the date of adoption of this section."

This Court now is to consider the adoption of "court rules" designed to "limit access to records." Patently such rules of this Court should be consistent with the Proposed Constitutional Amendment taken as a whole. Two principles can be gleaned from the Proposed Constitutional Amendment: (1) the basic proposition is that all governmental records, including those of the judiciary, are open; and (2) exemptions from this broad proposition should "state with specificity the public necessity justifying the

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2/ This Court's initial decision in Locke v. Hawkes, 595 So.2d 32 (Fla. 1992), although modified on rehearing, made clear that absent a constitutional amendment, the Public Records Law would not apply to the judiciary. The Proposed Constitutional Amendment reverses that rule.

exemption" and "shall be no broader than necessary to accomplish the stated purpose." (Proposed Constitutional Amendment). As detailed in the specific comments on the Proposed Rules (Section II of this Response), the Proposed Rules do not comply with these fundamental principles.

2. This Court's Historic Practice.

Historically, this Court has dealt with the right of the public to access in two ways; first, in its role as ultimate administrator of Florida's judicial system, and second, as the ultimate interpreter of the Public Records Law. In both capacities, this Court has been an admirable custodian of the public's right of access to public records and open government. In fact, this Court has been a major factor in causing Florida's government to operate in the "sunshine", a nationally and internationally recognized feature of Florida's government.

This Court has historically imposed stringent standards upon agencies subject to the open government laws, and has required them to carry a heavy burden in justifying any non-disclosure. See, e.g., Neu v. Miami Herald Publishing Company, 462 So.2d 821 (Fla. 1985); Wood v. Marston, 442 So.2d 934 (Fla. 1983); Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979); Canney v. Board of Public Instruction, 278 So.2d 260 (Fla. 1973); Board of Public Instruction v. Doran, 224 So.2d 693 (Fla. 1969). While imposing strict standards favoring open government, this Court has often recognized that such openness is not always convenient, not

always comfortable, and certainly not always liked by public employees; however, this Court has remained steadfast in its conclusion that openness is a fundamental feature of Florida's government, and that even after taking into account the inconvenience, Florida is still better for consistently following the rule of governmental openness. As this Court observed in 1979 when it first allowed electronic media coverage of judicial proceedings: "... on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage. The prime motivating consideration prompting our conclusion is this state's commitment to open government." Petition of Post-Newsweek Stations, Inc., 370 So.2d 764, 780 (Fla. 1979) (emphasis added). As this Court further observed, the legislative branch initially had the same reluctance and fears toward open government, only to find after experience that openness actually enhanced rather than degraded the legislative process.[3/]

This Court, should it revise the Proposed Rules as recommended herein, will find in time that the apparent fears and reluctance of the drafters of these Proposed Rules to permit disclosure of judicial records are equally unfounded, and that a

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3/ "Many of our legislators had their doubts about the wisdom of gavel-to-gavel televising because they feared television would encourage grandstanding. This did not happen. Instead, television coverage had a favorable impact on the lawmaking process." Id. at 780, citing remarks by Allen Morris, Clerk, Florida House of Representatives, at Annual Meeting of the American Society of Legislative Clerks and Secretaries, New Orleans, La., November 29, 1977.

maximum openness of judicial records will further enhance the perception of the judiciary as an instrument of justice and aid the judicial process taken as a whole.

a. This Court's Role In Opening The Judicial Process.

In its handling of the judicial process (whether as administrator of that process or interpreter of the First Amendment), this Court has traditionally upheld the public's access rights. Just a few salient examples are:

- This Court led the United States in its broad introduction of "cameras in the courtroom."[4/]
- This Court has broadly upheld access to the courtroom.[5/]
- This Court has broadly upheld access to material delivered by the prosecutor to defense counsel.

Generally, but not always, this Court has applied stringent standards of openness to the judicial branch. *See*, e.g., Barron v. Florida Freedom Newspapers, 531 So.2d 113 (Fla. 1988); but also see, Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32 (Fla. 1988) (temporarily sealing public records constituting pretrial discovery in a criminal proceeding); and Miami Herald Publishing Company v. Gridley, 510 So.2d 884 (Fla. 1987), cert.

[4/] See Petition of Post-Newsweek Stations, Inc., 370 So.2d 764 (Fla. 1979).

[5/] State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1976); Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982); Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988).

denied, 485 U.S. 960 (1988) (unfiled discovery material in a civil case not subject to public disclosure). Yet, even when this Court denied access, it has done so reluctantly and only in accordance with perceived overriding concerns of public necessity.

b. This Court's Role As Interpreter Of The Public Records Law.

In its role as interpreter of Florida's Public Records Law and the parallel "Government in the Sunshine" Law, this Court has consistently enforced the overriding principle that "[s]tatutes enacted for the public benefit should be interpreted most favorably to the public." Board of Instruction of Broward County v. Doran, 224 So.2d at 699. Almost a quarter-century ago this Court clearly articulated the dangers of a closed, secret government:

> The right of the public to be present and to be heard during all phases of enactment by boards and commissions is a source of strength in our country. During past years, tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions and study sessions have become synonymous with "hanky-panky" in the minds of public-spirited citizens. One purpose of the sunshine law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

(emphasis added). In the past twenty-odd years of open government, this Court has recognized and applied these same principles time and time again. See, e.g., New v. Miami Herald Publishing Company,

462 So.2d 821 (Fla. 1985); Wood v. Marston, 442 So.2d 934 (Fla. 1983); and Wait v. Florida Power & Liaht Co., 372 So.2d 420 (Fla. 1979).

3. The Care Required Of This Court At This Time

Now this Court must adopt such rules as are necessary to be grandfathered under the Proposed Constitutional Amendment when adopted. As noted, these rules should meet a dual test: (1) all governmental records, including those of the judiciary, are open; and (2) exemptions from this broad proposition should "state with specificity the public necessity justifying the exemption" and "shall be no broader than necessary to accomplish the stated purpose." (See, Proposed Constitutional Amendment).[6/]

Further, this Court must be perceived as being fair to its coordinate branches of the government, the legislature and the executive. Exercising its role as judicial administrator, it Should not limit access to records that it will require, as an interpreter of applicable law, the other branches to produce.

Finally, this Court's rules should be consistent with its history of openness in government. Thus, "privacy" considerations may be a factor in adopting rules of the court only in the extreme situation. First, Article I, Section 23 specifically states that

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[6/] The Proposed Constitutional Amendment is consistent with the stringent standards required for statutory exemptions to the Public Records Law, which standards have been upheld and enforced by this Court. Michel v. Douglas, 464 So.2d 545 (Fla. 1985); Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984); see also, The Miami Herald vs. City of North Miami, 452 (Fla. 3d DCA 1984).

it shall not "limit the public's right of access to public records." Secondly, assuming the adoption of the Proposed Constitutional Amendment, that Amendment places the public's right of access to public records as being of equal constitutional dimension to the privacy right. Third, an over-emphasis on the privacy right obscures the prophylactic impact of public records access on the unnecessary collection of information of public employees.[7/]

This Court should follow the same basic principles in reviewing the Proposed Rules which govern the creation of legislative exemptions from the Public Records Law. See, Section 119.14(4)(b), Florida Statutes, which requires periodic review of legislatively created exemptions to determine if each such exemption "serves an identifiable public purpose" and "is no broader than necessary to meet the public purposes it serves." The provision further requires that the "identifiable public purpose" must be "sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption." Id. There is no such case made here with respect to the Proposed Rules.

7/ When a record is known to be public, only necessary information is likely to be collected to be placed in the public record. Unnecessary information is likely to be eliminated by simply no longer being collected. This limitation on the public collection of unnecessary information is in itself a public good.

No such standards have been applied to the exemptions created by the Proposed Rules. Thus, while the confidentiality contemplated by Rule 1 of the Proposed Rules of Judicial Administration may relate to protection of the interests of litigants before the court, the confidentiality involved in Rule 3 relates solely to protection of a "court interest." The Press can conceive of no "compelling court interest" which outweighs the public's right to full access to a court's administrative deliberations. Nor is any such "compelling" interest identified.

11. DETAILED ANALYSIS OF THE PROPOSED RULES

A. The Proposed Rules Fail To Distinguish Between The Two Very Different Administrative Roles Of The Courts.

The Proposed Rules fail to draw a clear distinction between the two roles of the courts as administrator: (a) the role of the courts as an employer of personnel and expender of public funds; and (b) the role of the courts as supervisor and custodian of judicial records.

In its administrative role as employer and expender of public funds, the courts are no different than any other agency of the government, and thus records generated while the courts perform these functions should be subject to the same standards that govern disclosure of like records by the other branches of government. It would be a mistake for the courts to "reinvent the wheel" by drafting rules regarding disclosure of such records, both because

it is unnecessary and unwise and because differential treatment of one set of public employees from another set of public employees is woeful public policy. The legislature has already been forced to think through what exemptions from the general rule of disclosure of personnel files is appropriate, and the legislature has done so with particularity. For this Court to re-draft different rules for employees of the judiciary is unnecessary and unwise, and if done at all, could require similar particularity. News-Press Publishing Co. vs. Wisher, 345 So.2d 646 (Fla. 1977). Application of existing public records law to judicial employees is both simpler and more appropriate. The same principle is true for issues of records relating to financial management and budgeting and normal administrative practice.

With respect to the courts' second role, that of supervisor and custodian of judicial records, the courts may justifiably be viewed as very different from other public agencies, simply because judicial records, reflecting or arising from the adjudicatory function of the courts, are different from other records commonly referred to as "public records."

B. The Proposed Rules Fundamentally Misconceive The Very Concept Of Public Access To Records.

One simple quote of an "administrative" provision of this procedural access exemplifies the tendency to want to turn the Public Records Law on its head, placing the burden on the person seeking the record rather than upon the public body serving the public:

> Demands for access to public records under this rule shall be made in a reasonable manner which does not interfere with the normal functions or duties of the persons to whom such demand is made.

First, a request to inspect and copy a public record -- a constitutional right once the Proposed Constitutional Amendment is adopted -- is not a "demand". Second, it is to be expected that access to public records may well cause some administrative inconvenience. However, the production of these public records to the public must be seen as one of the "normal functions or duties" of court personnel, not some alien function to be complied with only when "convenient".

Furthermore, such elements of discretion placed in court employees to determine what is or is not a "public record," what is or is not "reasonable" or "within a normal function" must be looked upon with grave suspicion. The legislature has discovered the validity of this truism. Tribune Company vs. Cannella, 458 So.2d 1075 (Fla. 1984). Production of public records must be an automatic function. If there is any discretion at all to be granted, it must be placed in the highest-level custodians.

C. Specific Comments To The Proposed Amendments To The Rules Of Judicial Administration.

Rule 1. The Press does not dispute the Court's need for confidentiality of some judicial records generated by the court in its adjudicatory function. However the phrase "other written materials . . . prepared by persons at the direction of the court as part of the court's decision-making process" might be read as

comprehending records generated by other branches in their respective role as administrators. The suggested changes limit the rule to true judicial records.

Rule 2. The Press suggests this proposed rule be deleted in its entirety, as it appears to exempt records generated by the court solely in the exercise of its administrative or quasi-legislative functions. These are exactly the types of records which should be public, since they are no different in kind than similar records developed by the other two branches of government.

Rule 3. This Proposed Rule clearly relates to materials generated by the court in its administrative (as opposed to adjudicatory) capacity, and as such should be deleted in its entirety. As noted previously, the confidentiality here referenced is the confidentiality neither of litigants nor of the adjudicatory process, but of the court system itself.

Rule 4. Despite the stringent standards for openness for other branches of government, Rule 4 of the Proposed Rules of Judicial Administration seeks to exempt disciplinary records. Florida's current law regarding complaints against public servants and licensed professionals is inconsistent. Complaints against most public employees or elected officers are either open from the time of filing or become open upon a finding either way with respect to probable cause. However, in the case of attorneys and professionals regulated by the Department of Professional Regulation, records remain confidential unless and until a determination is made that probable cause does exist.

The Press sees no justification for cloaking disciplinary records with respect to one group of public servants with greater secrecy than those of another group. Consequently, the Press has long advocated the adoption of a uniform policy whereby records relating to the investigation of a complaint become open upon a finding either way with respect to probable cause.

Furthermore, applicants for judicial vacancies in any Florida court must, as a requirement for consideration, execute a wavier of confidentiality of all materials necessary to adequately investigate each applicant, including but not limited to, disciplinary records of The Florida Bar, records of the Florida Board of Bar Examiners, credit records, records of any law enforcement agency and where applicable, records of the Florida Judicial Qualifications Commission. (See, Section 1 to Supreme Court Nominating Commissions, Rules of Procedure; Section 1 to Uniform Rules of Procedure for District Courts of Appeal Judicial Nominating Commissions; and Section 1 to Uniform Rules of Procedure for Circuit Court Judicial Nominating Commissions). Such records are available as "public records" (except those exempted by the Commission because of a finding that confidentiality is essential to accomplish an overriding governmental agency that would not provide such records absent the Commission's assurance that such information supplied would remain confidential. It is incongruous that the disciplinary records of judicial applicants would be available as public records, but not the disciplinary records of sitting judges.

Rule 5. No comment.

Rule 6. Rule 6 to the Rules of Judicial Administration provides an exemption from disclosure for all "applications by and evaluations of persons applying to serve as volunteer personnel to assist the court," without ever specifying whether this exemption applies to volunteers who are ultimately paid (as attorneys who volunteer to become court-appointed attorneys are) or only to unpaid volunteers. The proposed rule has been revised to apply only to unpaid volunteers.

Rule 7. No comment.

Rule 8. The Press suggests inclusion of this exemption in Paragraph 10 since it might require review of the document in dispute and judicial interpretation of the state or federal provision claimed to provide for confidentiality.

Rule 9. Florida statutes exempt disclosure of certain records of public employees (for example, the exemption for certain medical records under Section 119.07(x) and examination answers for licensure under Section 119.07(c)). If this Court believes such statutes to already apply to judicial employees, then no Rule is required. If this Court believes these statutes apply to judicial employees only if made to do so by Rule, then the Rule should incorporate by reference these exemptions, so it is clear such exemptions apply to employees of the judicial branch.

The issue of confidentiality of records as addressed by the Proposed Rules is also problematic. The Proposed Constitutional Amendment preserves all "rules of court" that are in

effect on the date of adoption of the amendment, November 3, 1992, if the amendment passes. It expressly preserves all "laws" that are in effect on July 1, 1993, and makes no reference to "common law". The intent of this provision is to give this Court with respect to rules, and the legislature with respect to statutes, the opportunity to review existing rules and laws on confidentiality and delete or add to them prior to the separate cutoff dates.[8/] Thereafter, only the legislature could provide for confidentiality, and only in compliance with the new constitutional requirements. The Proposed Rules would incorporate into "court rules" all confidentiality statutes in effect on the date of adoption of the provision. (See, for example, Rules 9 and 10 of the Proposed Rules Of Judicial Administration). Read literally, the Court would be adopting a rule allowing itself to adopt future rules creating confidentiality, thereby circumventing the clear language of the Proposed Constitutional Amendment.

Rule 10. To the extent that this provision is intended to provide courts with the discretion to close records in appropriately limited circumstances on a case-by-case basis, the Press has no objection. However, the Press requests three modifications of the rule as worded.

First, the reference to "court rule" should be deleted. The proposed constitutional amendment preserves confidentiality rules adopted by this Court prior to the time of its enactment.

[8/] To the extent the Proposed Rules include "common law confidentiality," they are inconsistent with this Court's holding in Wait v. Florida Power & Light Co., 372 So.2d 420 (1979).

After its enactment, records of the judiciary, as those of other branches, can only be made confidential by the Legislature. By including the term "court rule" in paragraph 10, the Court would be adopting a rule allowing itself to adopt future rules creating confidentiality, thereby circumventing the clear language of the Constitutional Amendment.

Second, it is requested that additional language be added to the beginning of this provision to emphasize the fact that there is a strong presumption of openness and that confidentiality is an exception requiring a clear showing of necessity.

Third, it is requested that the rule be modified to require that a court declaring a record confidential must make specific findings of fact, supported by the record, to justify such declaration.

Access: The Press strongly recommends the deletion of the paragraph requiring that "demands" for access to public records be made in a "reasonable manner" and "not interfere with the normal functions or duties of the persons to whom such demand is made." As stated above, it reflects a total misconception of public access to records, places discretion where it should never be placed and contravenes this Court's decision in Tribune Company v. Cannella, 458 So.2d 1075 (Fla. 1984).

Retention: The Press recommends the records required by Paragraph 1 be retained at least 30 days.

D. Comments To The Proposed Amendments To The Rules Regulating The Florida Bar.

Rule 1-14.1(a). The records deemed "confidential" have been conformed to the definition used with respect to the Proposed Rules of Judicial Administration, as revised. This rule seeks to exempt "the files, interoffice memoranda and other records pertaining to personnel matters." Included in such exemption are the "personnel files and personal information" of employees of the judicial branch. As discussed above, employees of the judicial system should be treated just like employees of the other branches of government, absent extraordinary circumstances which are specifically detailed. The Florida Bar, which has long enjoyed the benefits of being part of the judicial system must likewise bear its burdens. The Florida Bar cites, as grounds for such exemption that disclosure would "subject its employees to unwarranted intrusions into their privacy." However, Article I, Section 23 specifically makes the constitutional right of privacy inapplicable to public access to records; the Proposed Constitutional Amendment, if adopted, is of equal constitutional stature; and public records access has a prophylactic impact on collection of unnecessary information. The Press therefore recommends deletion of these portions of proposed Rule 1-14.1(a).

Rule 1-14.1(b). This provision has been deleted as unnecessary because of the revisions made to Section (a) above. The requirement that no disputed records be made available without an order of this Supreme Court has also been deleted.

Rule 1-14.1(c). This provision should be deleted. It is unnecessary, since if the Florida Evidence Code, the Florida Rules of Civil Procedure or the Florida Rules of Criminal Procedure exempt records of the Florida Bar, then they do so in and of themselves.

Rule 1.14-1(d). The Press has deleted the references to charging different "reproduction costs" to different "classes of persons" as provided in Rule 1-14.1, and the requirement for an order from this Court before having to produce any records the Bar claims are exempt from disclosure. Such requirements are inconsistent with the long-standing history of openness in government, and should be modified to reflect procedures used with respect to the Public Records Law.

Rule 1.14-1(e). No comment.

Rule 2-9.4(d). The exemption for advisory ethics opinions has been deleted, absent a showing by the Bar that there is some compelling public interest in not disclosing such information. The Press has no objection to a policy deleting names and certain information, if there is a compelling reason therefore (for example, the Department of Revenue releases tax advisory opinions (TAA's) after deleting names, addresses and any other identifying material) but the opinion should be public. If public, all the remainder of the Proposed Rules are unnecessary.

Rule 7-5.1. Claims for reimbursement, insofar as they are akin to grievances, should be treated in the same fashion as to

disclosure. Full information as to claims paid, which constitutes a determination of validity of the claim, should be public.

Rule 10.8. No comment.

Rule 15-4.2(b). Over-broad exemptions for anything classified by the submitting attorney as a "trade secret" or "proprietary information" have been deleted. Likewise, the exemption from disclosure in Rule 15-4.2 of the Proposed Rules of the Florida Bar for "interoffice and intraoffice memoranda of the bar that formalize knowledge and communicate information" arguably exempts from disclosure any document in the possession of the Florida Bar. When the application of an exemption is doubtful, as it is here, a public official who believes the greater good is served by secrecy -- contrary to the announced public policy of this State -- will fasten upon ambiguity and overly-broad language as a basis for denying the public's access to public records. This is contrary to the well-established principle adopted by this Court: that to the extent the Court believes any section is ambiguous, Florida's appellate courts (following this Court's lead) consistently have recognized that the Public Records Law favors disclosure of public records and all doubts should be resolved against secrecy. Downs v. Austin, 522 So.2d 931, 933 (Fla. 1st DCA 1988), citing Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775, 780 n.1 (Fla. 4th DCA 1985); and Tribune Co. v. Public Records, P.C.S.O., 493 So.2d 480, 483 (Fla. 2d DCA 1986).

II OSED RULES WITH STEI REVISIONS

A. Florida Rules Of Judicial Administration

Public Access to Judicial Records

Subject to the rulemaking power of the Florida Supreme Court provided by Article V, Section 2, Florida Constitution, the following rule shall govern public access to the records of the judicial branch of government and its agencies.

The public shall have access to all records of the judicial branch of government and its agencies, except as provided below, [There is a presumption of openness and, except as otherwise specifically provided, confidentiality shall be imposed only upon a clear and convincing showing of necessity for the reasons stated below.]

The following records of the judicial branch and its agencies shall be confidential:

1. Trial and appellate memoranda, drafts of opinions and orders, court conference records, notes, and other written materials [of a similar nature] prepared by [judges or] court staff, ~~/judges, or other persons acting on behalf of or/~~ at the direction of the court as part of the court's judicial decision-making process utilized in disposing of cases and controversies before Florida courts.

~~/ 2. Preliminary drafts, notes, or other written materials which reflect the tentative thought processes of court committees and judicial conferences, and the members thereof, assigned to perform functions affecting the administration of justice in Florida.~~

~~3. Memoranda or advisory opinions prepared by the office of the Court administrator that relate to the administration of the court and that require confidentiality to protect a compelling court interest which cannot be adequately protected by less restrictive measures. The degree of confidentiality imposed shall be no broader than necessary to protect the compelling court interest involved. The decision that confidentiality is required with respect to such administrative memorandum or written advisory opinion shall be made by the chief judge of the court involved, subject to review as provided below./~~

4. Complaints alleging misconduct against judges and other entities or individuals licensed or regulated by the courts until [a finding is made with respect to] probable cause. ~~/ is established, unless otherwise provided./~~

5. Periodical evaluations implemented solely to assist judges in improving their performance, all information gathered to form the bases for the evaluations, and the results generated therefrom.

6. Applications by and evaluations of persons applying to serve as [unpaid] volunteer personnel to assist the court, at the court's request and direction, unless made public by court order based on a showing of materiality in a pending court procedure.

7. Copies of arrest and search warrants and supporting affidavits retained by judges, clerks, or other court personnel until execution of said warrants or a determination is made by law enforcement authorities that such execution cannot be made.

~~/ 8. All records made confidential under the Florida and United States Constitution and Federal law./~~

9. All court records presently deemed to be confidential by court rule,/, ~~Florida Statutes, or common law of the State of Florida /~~[9]/

10. ~~Any court record upon judicial determination in case decision or court rule that/~~ [A court record may be declared confidential upon judicial determination in a particular case based upon specific findings of fact supported by clear and convincing evidence in the record that]:

a. Confidentiality is required [based upon consideration of the following factors]:

(1) To prevent a serious and imminent threat to the fair, impartial and orderly administration of justice; or
(2) To protect trade secrets; or
(3) To protect a compelling governmental interest; or
~~(4) To obtain evidence to determine issues in a case; or~~
~~(5) To avoid substantial injury to innocent third parties; or~~

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[9]/ See, e.g., Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32 (Fla. 1988) (pre-trial discovery material in criminal action before filing); Miami Herald Publishinu Co. v. Gridley, 510 So.2d 884 (Fla. 1987) (unfiled discovery in civil actions); Petition of Kilgore, 65 So.2d 30 (Fla. 1953) (advisory opinions not public until delivered to Governor and filed with Clerk); Tribune Co. v. D.M.L., 566 So.2d 1333 (Fla. 2d DCA 1990) (proceedings involving involuntary placement and treatment of mental patient).

~~(6) To avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed; or/~~

(7) To comply with established public policy set forth in the [Florida or United States] constitution, [or] statutes, [or Florida] rules or case law;

b. The degree and manner of confidentiality ordered by the court ~~/is/~~ [shall be] no broader than necessary to protect the interests set forth in Subsection **(a)** above; and

c. No less restrictive measures are available to protect the interests set forth in Subsection **(a)** above.[10/]

Review of Denial of Access Request.

Expedited review of denials of access to judicial records, or to the records of judicial agencies, shall be provided through an action for mandamus in the following manner:

1. Where a judge, other than a justice of the Supreme Court, has decided **a** request for access to records in the judge's possession or custody, the mandamus action shall be filed in the court having appellate jurisdiction to review the decisions of the judge denying access;

2. Where a justice or agency of the Supreme Court has denied a request for access to records in the possession or custody of the justice or agency, the mandamus action shall be filed in the Florida Supreme Court and heard by a judge or judges assigned to hear the action by the Chief Justice of the Florida Supreme Court;

[10/] See, e.g., Barron v. Florida Freedom Newspapers, Inc., 531 So.2d **113** (Fla. **1988**); Miami Herald Publishing Co. **v.** Lewis, **426** So.2d 1 (Fla. 1982); In re Petition of Post-Newsweek Stations, Florida. Inc., **370** So.2d **764** (Fla. 1979); State ex rel. Miami Herald Publishing Co. **v.** McIntosh, **340** So.2d **904** (Fla. **1977**); State ex rel. Gore Newspapers Co. **v.** Tyson, **313** So.2d **777** (Fla. 4th DCA 1975), overruled on other grounds, Enslish v. McCrary, **348** So.2d 293 (Fla. **1977**).

3. All other mandamus actions under this provision shall be filed in the circuit court of the circuit in which such denial of access occurs.

~~/Demands for access to public records under this rule shall made in a reasonable manner which does not interfere with t made./~~

Retention of Public Records

Except as otherwise provided, or pending promulgation of additional rules, public records of the judicial branch and its agencies shall be retained as follows:

1. Advertisements, correspondence, and other written material made or received by personnel of the judicial branch or its agencies which do not relate to a closed or pending case or proceeding or to the administration of the courts and which are not used or considered in the performance of official duties and responsibilities, [shall] be retained for a period of 30 days.

2. Where a document or other writing is a public record, a duplicate of such document or writing need not be retained.

3. Other public records of the judicial branch shall be retained for such periods as set forth in Rule 2.075 of the Rules of Judicial Administration.

4. Additional rules governing the retention of public records of the judicial branch or its agencies may be promulgated from time to time.

This court shall issue all orders reasonable or necessary for the proper implementation of this rule.

B. Revisions To Proposed Amendments To The Rules Regulating The Florida Bar

1-14 RECORDS

RULE 1-14.1 ACCESS TO RECORDS

(a) Confidential Records. All records specifically designated confidential [by court rules or under the Florida or United States Constitution] ~~elsewhere Florida Bar and the files, interoffice memoranda, and other records pertaining to personnel matters, attorney work product, and attorney-client communications /are property of The Florida Bar and/~~shall be confidential. ~~/In the event that The Florida Bar objects to production, these records shall not be produced without order of the Supreme Court of Florida./~~

~~/ (b) Records Confidential under Applicable Law. All records in the possession of The Florida Bar that are confidential under applicable rule or law shall remain confidential and shall not be produced by the bar, except as authorized by rule or law or pursuant to order of the Supreme Court of Florida./~~

~~/ (c) Rules of Procedure and Florida Evidence Code; Applicability. Except as otherwise provided in these Rules Regulating The Florida Bar any restrictions to production of records contained in the Florida Evidence Code (section 90, Florida Statutes, as amended), Florida Rules of Civil Procedure, or Florida Rules of Criminal Procedure shall apply to requests for access to the records of The Florida Bar./~~

(d) **Access** to **Records; Notice; Costs** of **Production.** Any records **of** the bar that are not designated confidential by these Rules Regulating The Florida Bar shall be available **for** inspection or production to **any** person upon reasonable notice. ~~/and upon payment of the cost of identification and production of the records. For purposes of this rule, the cost of identification of the records shall be the actual cost of staff time required to identify and produce the records. The board of governors of The Florida Bar is hereby authorized to determine the cost of reproduction of the various records of the bar and the classes of persons to whom charges for reproduction shall apply./~~

(e) Maintenance of Records. The Florida **Bar** is hereby authorized to develop a records maintenance policy that shall include the length of time that and the medium in which the records of the bar shall be maintained.

BYLAW 2-9.4 ETHICS

(a) Rules of Procedure. The **board** of governors shall adopt rules of procedure governing the manner in which opinions on professional ethics may be solicited by members of The Florida Bar, issued by the staff of The Florida Bar or by the professional ethics committee, circulated or published by the staff of The Florida Bar or the professional ethics committee and appealed to the board of governors of The Florida Bar.

(b) Amendment. The adoption of, repeal of, or amendment to the rules authorized by subdivision (a) shall be effective only under the following circumstances:

(1) The proposed rule, repealer, or amendment shall be approved by a majority vote of the **board** of governors at any regular meeting of the board of governors.

(2) The proposal thereafter shall be published in The Florida Bar News at least 20 days preceding the next regular meeting of the board of governors.

(3) The proposal shall thereafter receive a majority vote of the board of governors at its meeting following publication **as** herein required.

(c) Waiver. The rules of procedure adopted **as** required in subdivision (a) may be temporarily waived **as** to any particular matter only upon unanimous vote of those present at any regular meeting of the **board** of governors.

~~/ (d) Confidentiality. Each advisory ethics opinion issued by Florida Bar ethics counsel be identified as a "staff opinion." Staff opinions are advisory only and shall be issued only to the members of The Florida Bar making the request. Subject to the exceptions set forth below, staff opinions and all information relating to requests for opinions shall be confidential.~~

~~(1) If false or misleading public statements are made about any advisory opinion or request for opinion, ethics counsel may disclose information necessary to correct such false or misleading statements.~~

~~(2) If the defense of a respondent in a disciplinary proceeding includes reliance on the receipt of a staff opinion, ethics counsel may release to the bar counsel, grievance committee, referee, or board of governors information concerning the opinion or the request for opinion that would otherwise be confidential under this rule./~~

7-5. RECORDS

RULE 7-5.1 ACCESS TO RECORDS

(a) Confidentiality. All matters, including, without limitation, claims, proceedings (whether transcribed or not), files, preliminary and/or final investigation reports, correspondence, memoranda, records of investigation, records of the committee and the board of governors involving claims for reimbursement ~~/are property of The Florida Bar and /~~are confidential. ~~/Confidential matters shall not be disclosed except as provided in this rule /~~

(b) Publication of Payment Information. After the board of governors has authorized payment of a claim, the bar may publish the nature of the claim, the amount of the reimbursement, and the name of the lawyer who is the subject of the claim. The name, address, and telephone number of the claimant shall remain confidential unless specific written permission has been granted by the claimant permitting disclosure.

(c) Response to Subpoena. The Florida Bar may, pursuant to valid subpoena issued by a regulatory agency (including professional discipline agencies) or other law enforcement agencies, provide any documents that are otherwise confidential under this rule. The Florida Bar may charge a reasonable fee for identification and photocopying of the documents.

(d) Response to False or Misleading Statements. The Florida Bar may make any disclosure necessary to correct a false or misleading statement made concerning a claim.

(e) statistical Information. Statistical information and/or analyses that are compiled by the bar from matters designated as confidential by this rule shall not be confidential and the bar may disclose or publish such statistical OF analytical information.

10-8. CONFIDENTIALITY

RULE 10-8.1 FILES

(a) Files Are Property of Bar. All matters, including files, preliminary investigation reports, interoffice memoranda, records of investigations, and the records in trials and other proceedings under these rules, except those unlicensed practice of law matters conducted in county or circuit courts, are property of The Florida Bar. All of those matters shall be confidential and shall not be disclosed except as provided in these rules. When

disclosure is permitted under these rules, it shall be limited to information concerning the status of the proceedings and any information that is part of the UPL record as defined in these rules.

(b) UPL Record. The UPL record shall consist of the record before a circuit committee, the record before a referee, the record before the Supreme Court of Florida, and any reports, correspondence, papers, and recordings and transcripts of hearings furnished to, served on, or received from the respondent or the complainant. The record before the circuit committee shall consist of all reports, correspondence, papers, and recordings furnished to or received from the respondent and the transcript of circuit committee meetings or hearings, if the proceedings were attended by a court reporter; provided, however, that the committee may retire into private session to debate the issues involved and to reach a decision as to the action to be taken. The record before a referee and the record before the Supreme Court of Florida shall include all items properly filed in the cause including pleadings, transcripts of testimony, exhibits in evidence, and the report of the referee.

(c) Limitations of Disclosure. Any material provided to or promulgated by The Florida Bar that is confidential under applicable law shall remain confidential and shall not be disclosed except as authorized by the applicable law. If this type of material is made a part of the UPL record, that portion of the UPL record may be sealed by the circuit committee chair, the referee, or the court.

(d) Disclosure of Information. Unless otherwise ordered by this court or the referee in proceedings under this rule, nothing in these rules shall prohibit the complainant, respondent, or any witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons.

(e) Response to Inquiry. Representatives of The Florida Bar, authorized by the board of governors, shall reply to inquiries regarding a pending or closed unlicensed practice of law investigation as follows:

(1) Cases Opened Prior To November 1, 1992. Cases opened prior to November 1, 1992 shall remain confidential.

(2) Cases Opened On or After November 1, 1992. In any case opened on or after November 1, 1992, the fact that an unlicensed practice of law investigation is pending and the status of the investigation shall be public information; however, the UPL record shall remain confidential except as provided in rule 10-8.1(e)(4).

(3) Recommendations of Circuit Committee. The recommendation of the circuit committee as to the disposition of an investigation opened on or after November 1, 1992, shall be public information; however, the UPL record shall remain confidential except as provided in rule 10-8.1(e)(4).

(4) Final Action by Standing Committee and UPL Staff Counsel. The final action of the standing committee on investigations opened on or after November 1, 1992, shall be public information. Once the recommendation is accepted, the UPL record in cases opened on or after November 1, 1992, that are closed by the standing committee or UPL staff counsel as provided elsewhere in these rules, cases where a cease and desist affidavit has been accepted, and cases where a litigation recommendation has been approved shall be public information and may be provided upon specific inquiry except that information that remains confidential under rule 10-8.1(c). The Florida Bar may charge a reasonable fee for identification of and photocopying the documents.

(f) Production of UPL Records Pursuant to Subpoena. The Florida Bar, pursuant to a valid subpoena issued by a regulatory agency, may provide any documents that are a portion of the UPL record even if otherwise deemed confidential under these rules. The Florida Bar may charge a reasonable fee for identification of and photocopying the documents.

(g) **Notice to Judges.** Any judge of a court of record may be advised as to the status of a confidential unlicensed practice of law case and may be provided with a copy of the UPL record. The judge shall maintain the confidentiality of the matter.

(h) Response **to False or** Misleading Statements. If public statements that are false and misleading are made about any UPL case, The Florida Bar may make any disclosure necessary to correct such false or misleading statements.

(i) **Providing Otherwise Confidential** Material. Nothing contained herein shall prohibit The Florida Bar from providing otherwise confidential material as provided in rule 10-3.2(f).

RULE 15-4.2 RECORDS

(a) **Maintenance** of Records. The committee shall keep records of its activities for 3 years.

(b) Public Access to Records. All records **of** the committee shall be open for public inspection and copying with the following exceptions:

~~/ (1) proposed advertisements and proposed direct mail communications filed for advisory review when the submitting attorney advises the committee that the materials constitute protected trade secrets or proprietary information;~~

~~(2) the media, frequency and duration of an advertisement when the submitting attorney advises the committee that the information constitutes protected trade secrets or proprietary information;/~~

(3) the names and addresses of recipients of direct mail communications;

(4) information made confidential by rule of the Supreme Court of Florida;

(5) attorney-client communications between the bar, its committees and staff and those attorneys retained by the bar in anticipation of, or during, civil litigation:

(6) work product prepared by an attorney retained by the bar in anticipation of, during, civil litigation; and

~~(7) interoffice and intraoffice memoranda of the bar that formalize knowledge and communicate information.~~

(c) Inspection of Copyrighted Material. Copyrighted work may be inspected but not reproduced.

CONCLUSION

The Proposed Rules generally fail the historical standards of the Public Records Law and of this Court on three separate grounds:

- They are overbroad, ambiguous, and do not state at all (let alone with any specificity), the public necessity justifying the exemptions.
- They are inconsistent with this Court's past constructions of the Public Records Law and the principle of openness in government, as applied to other branches.
- They are crafted for the convenience of public employees, not the public, and will frustrate the public right of access mandated by the Proposed Constitutional Amendment.

In 1979, this Court, finding [t]he court system is no less an institution of democratic government in our society" than the legislative branch, provided the leadership to open judicial proceedings to the public in the broadcast sense -- through the camera's eye. Petition of Post-Newsweek Stations, Inc., 370 So.2d at 780. As this Court noted then, "We have no need to hide our bench and bar under a bushel. Ventilating the judicial process, we submit, will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system." Id. at 781 (emphasis added). This Court should continue to develop a judicial "system and judges in which we can take pride" by adopting the Proposed Rules as revised, consistent with the standards discussed herein. Id. Unless the Proposed Rules are revised and limited as

suggested herein, the primary goal of the public records act to "promote open government and citizen awareness of its working" and therefore, "enhance and preserve democratic processes" is endangered, if not eviscerated. Byron, Harless, Schaffer, Reid & Associates, fnc. v. state ex, rel. Schellenberg, 360 So.2d 83, 97 (Fla. 1st DCA 1978), quashed on other grounds, 379 So.2d 633 (Fla. 1980).

THOMSON MURARO RAZOOK & HART, P.A.

Parker D. Thomson (Fla. Bar #081225)
Carol A. Licko (Fla. Bar #435872)
One Southeast Third Avenue
Suite 1700
Miami, Florida 33131
(305) 350-7200

Attorneys for The Florida Press Association and Florida Society of Newspaper Editors

CEBTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response of The Florida Press Association and Florida Society of Newspaper Editors was served by overnight mail this 30th day of September, 1992, upon tho following:

John F. Harkness, Jr.
Executive Director
Alan T. Dimond
President
John A. Boggs
Director of Lawyer Regulation
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

Carol A Licko